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# Stevens v. Eyer Appellant's Brief Dckt. 43532

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KENNETH EYER and SALLY EYER,  
husband and wife,

Third Party Plaintiffs/Appellants,

vs.

IDAHO FOREST GROUP, LLC,

Third Party Defendant/Respondent.

Supreme Court No: 43532-2015

Bonner County No. CV12-1563

Appeal from the District Court of the First Judicial District  
Of the State of Idaho, in and for the County of Bonner

Honorable Barbara Buchanan, Presiding

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**APPELLANTS' BRIEF ON APPEAL**

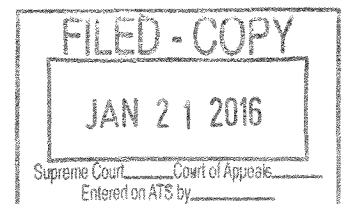
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Attorney for Respondent



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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

Ken and Sally Eyer were experiencing health issues and had to sell timber from their retirement property to help pay their medical bills. The Eyers contracted to sell the logs to Idaho Forest Group (hereinafter “IFG”). Prior to logging, IFG assisted the Eyers in locating property lines. A property line was crossed and the Eyers were sued for timber trespass. The Eyers brought a third party complaint against IFG for breach of an assumed duty to properly mark the property lines. A jury did not find that IFG assumed any duty to the Eyers and ruled in IFG’s favor.

IFG requested fees pursuant to Idaho Code 12-120(3) on the basis the transaction was a commercial transaction and the District Court awarded in excess of \$95,000 in fees notwithstanding the facts that the Eyers were retired and using the log proceeds to pay personal medical bills.

### **B. Proceedings**

After a favorable jury verdict, IFG requested attorney’s fees and costs. The Eyers timely objected and after hearing the District Court granted the request for fees in the amount of \$95,608.00. The District Court denied a motion to alter or amend and this appeal followed.

### **C. Facts**

Ken and Sally Eyer incurred some unexpected medical bills in 2009 and decided to log their retirement property to pay those bills. (R.84) The Eyers contacted IFG to inquire about logging their property. (Id) In late summer (R.170), IFG sent out a representative, Jeff Berend,

to walk the property with the Eysers to get an overview of what the land owner would like to have happen and to assist them with finding a logger. (R. 170)

IFG's representative Berend walked the property with Tim Farrell, the Eysers' son-in-law. (R.171) During the property walk, Berend and Farrell discussed the West property line and the fact that the line was not marked. (R. 172) Berend did not think the North line needed to be marked because of the scarce volume of timber located there. (Id) Thereafter Berend contacted a forester to run only the West line. (R.173)

When logging commenced, the loggers took trees from the property of Russell and Laura Stevens lying above the North line of the Eysers property that was not marked by the forester. (R.96) In 2012, Russell and Laura Stevens brought an action against the Eysers for timber trespass alleging that approximately \$1,600 in merchantable timber had been removed from their property and seeking in excess of \$270,000 in damages for triple replacement costs. (R.32-38) The Eysers filed a third-party complaint against IFG for common law indemnification and then amended the complaint to sue for negligence (R.217-221) alleging IFG had breached an assumed duty to assist them with marking the property lines prior to logging. A jury found that IFG had not assumed any duty to assist the Eysers in marking their property lines prior to logging. (R.294)

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## II. ISSUES ON APPEAL

- A. Did the District Court commit error when it concluded the transaction between the Eyers and IFG was a commercial transaction even though the Eyers had no commercial purpose because they were retired and using the proceeds to pay personal medical bills?
- B. Did the District Court commit error when it concluded the transaction between the Eyers and IFG was a commercial transaction even though the gravamen of the Eyers complaint was in tort, not contract?
- C. Are the Eyers entitled to attorney's fees on appeal?



### III. ARGUMENT

#### A. Standard of Review

Whether a transaction is a commercial transaction for purposes of an award of attorney's fees is a question of law over which this Court exercises free review. Idaho Transp. Dep't v. Ascorp, Inc., 159 Idaho 138, 357 P.3d 863, 865 (2015).

#### B. The Eyers were using the proceeds from the transaction with IFG to pay personal medical bills so the Eyers had no commercial purpose.

In order to award attorney's fees pursuant to Idaho Code 12-120(3), the transaction must be a commercial transaction and both parties entering into the transaction must have a commercial purpose. It was error for the District Court to award attorney's fees pursuant to Idaho Code 12-120(3) because the transaction was a commercial transaction for IFG, but not for the Eyers.

Idaho Code 12-120(3) allows a Court to award attorney's fees to a prevailing party if the action was based on a commercial transaction. Commercial transactions are all transactions other than those for personal or household purposes. *Id.* Commercial enterprises are enterprises engage in for profit. Daniel v. Moss, 93 Idaho 612, 613, 469 P.2d 50, 51 (1970). "[I]n order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." Brown v. Greenheart, 157 Idaho 156, 167, 335 P.3d 1, 12 (2014) citing Carrillo v. Boise Tire Co., 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012).

In Carrillo v. Boise Tire Co., Inc., 152 Idaho 741, 274 P.3d 1256, (2012), Carrillo sued Boise Tire Co. because Boise Tire Co. had negligently performed a tire rotation. Carrillo

claimed to be entitled to an award of attorney's fees because it was a commercial transaction.

The Supreme Court held, "We today make clear that, in order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." Id at 756, 1271. The Supreme Court then held that the transaction was not commercial because, "The Carrillos transacted with Boise Tire in order to obtain services for their personal vehicle and there is no indication that they intended to use the benefit of those services for a commercial purpose." Id.

In determining if a party has a commercial purpose, the focus is not the subject matter of the transaction, but the intentions of the parties entering into that transaction. For a transaction to be "commercial", the party's intent must be to put whatever consideration a party receives to a commercial purpose. For example, in *Carrillo*, the Carrillos received tires from Boise Tire Co. in exchange for the payment of money. Because no evidence existed that they intended to use the tires for a commercial purpose, then Idaho Code §12-120(3) did not apply. Also see Frontier Dev. Grp., LLC v. Caravella, 157 Idaho 589, 599, 338 P.3d 1193, 1203 (2014), reh'g denied (Sept. 25, 2014) – "In this case, the Caravellas' purpose for entering into the agreement with Horn and FDG was to construct a house for their personal use; therefore the transaction was not commercial."

In this case, it is undisputed that the Eyers were retired and were logging their property to pay personal medical bills. The consideration the Eyers received for their logs – money – was used for the non-commercial purpose of paying medical bills, just as the consideration the

Carillos<sup>1</sup> received for their money – tires – was used for their personal vehicle. It was error for this Court to award IFG its attorney’s fees because the Eyers had no commercial purpose in entering into the transaction with IFG.

C. **The gravamen of the Eyers’ complaint was not based on any contractual obligation of IFG, but upon an assumed duty in tort so it was error to conclude that the Eyers’ suit was based on a commercial transaction.**

In order to award attorneys fees based on a commercial transaction, the Court must find that the gravamen of the claim is a commercial transaction. In this case, the gravamen of the Eyers’ complaint was not the commercial transaction, but a duty assumed by IFG incident to that transaction and it was error to conclude that the claim was based on a commercial transaction.

“Thus, whether a party can recover attorney fees under Idaho Code section 12–120(3) depends on whether the gravamen of a claim is a commercial transaction. Great Plains Equip., Inc. v. Nw. Pipeline Corp., 136 Idaho 466, 472, 36 P.3d 218, 224 (2001). Sims v. Jacobson, 157 Idaho 980, 342 P.3d 907, 912 (2015)”. A claim for breach of an assumed duty is a negligence action where the duty of care results from a voluntary undertaking. Bowling v. Jack B. Parson Companies, 117 Idaho 1030, 793 P.2d 703 (1990).

The gravamen of the Eyers’ complaint is that IFG assumed that duty by sending out Jeff Berend to assist the Eyers in determining which property lines to mark and IFG breached the duty. The contract between IFG and Eyers did not require IFG to assist the Eyers with identifying property lines. If the Eyers neighbor would have engaged in the same conduct as Berend, the Eyers would have filed suit against that neighbor. While the existence of the

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<sup>1</sup> Carrillo v. Boise Tire Co., Inc., 152 Idaho 741, 274 P.3d 1256, (2012)

contract may have been what brought the Evers and Berend together, the contract is not the basis for the Evers claim against IFG. It was error to determine that the Evers gravamen of the Evers complaint was a commercial transaction.

D. **The Evers are entitled to attorneys fees on appeal because it is undisputed that the Evers had no commercial purpose.**

“Attorney fees can be awarded to the prevailing party on appeal under Idaho Code 12–121 only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Bird v. Bidwell*, 147 Idaho 350, 353, 209 P.3d 647, 650 (2009) citing *Fenwick v. Idaho Dept. of Lands*, 144 Idaho 318, 324, 160 P.3d 757, 763 (2007).

Idaho Law is clear that both parties must have a commercial purpose when entering into a transaction for that transaction to be considered a commercial transaction for purposes of awarding attorney’s fees to the prevailing party. It is undisputed that the Evers were retired at the time of the transaction and were using the proceeds from logging to pay personal medical bills. Under these circumstances it is frivolous for IFG to defend this appeal.

#### IV. **CONCLUSION**

For the Court to award attorneys fees pursuant to Idaho Code 12-120(3), the Court must find that a commercial transaction forms the basis for the claim and that both parties had a commercial purpose in entering into the transaction. IFG had a commercial purpose when it entered into the transaction with the Evers, but the Evers did not have the same intension - they were retired and selling logs to pay personal medical bills. In addition, the gravamen of the Evers complaint sounds in tort and is unrelated to any transaction.

It was error for the District Court to award IFG its attorney's fees in this case pursuant to Idaho Code 12-120(3) and this Court should reverse the District's Court award of attorney's fees to IFG.

DATED this 19<sup>th</sup> day of January, 2016.

A handwritten signature in dark ink, appearing to read 'Arthur M. Bistline', written over a horizontal line.

ARTHUR M. BISTLINE  
Attorney for Appellant/Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of January, 2016, I served a true and correct copy of the following APPELLANT'S BRIEF by the method indicated below, and addressed to the following:

Peter J. Smith IV  
Smith + Malek  
1250 Ironwood Drive, Ste 316  
Coeur d'Alene, ID 83814

<input checked="" type="checkbox"/>	Regular mail
<input type="checkbox"/>	Certified mail
<input type="checkbox"/>	Overnight mail
<input type="checkbox"/>	Interoffice Mail
<input type="checkbox"/>	Hand Delivered

  
JENNIFER JENKINS